

Appeal from decision by the District Manager, Prineville, Oregon District, Bureau of Land Management, effectively reducing the authorized grazing use of leased public domain land.

Remanded for hearing.

1. Grazing Leases: Assignment -- Grazing Leases: Cancellation or Reduction -- Grazing Leases: Renewal -- Rules of Practice: Appeals: Standing to Appeal

Where a reduction in the authorized use of land leased pursuant to section 15 of the Taylor Grazing Act is required in order to conform to the actual grazing capacity of the land, the full amount of that reduction must be imposed immediately rather than gradually. Where acceptance of the reduction is made a condition precedent for the approval of an assignment and for the issuance of a new lease, the assignee and prospective lessee will be held to have the same right to appeal the reduction as the original lessee.

2. Grazing Leases: Cancellation or Reduction -- Rules of Practice: Hearings

While a determination of the grazing capacity of public lands will not ordinarily be overturned in the absence of a clear showing of error, a hearing may be ordered to resolve conflicts in the opinions of different experts where the lessee has made a substantial and believable offer of proof which, if true, would show error in the Bureau of Land Management's determination.

APPEARANCES: W. F. Schroeder, Esq., Schroeder, Denning & Hutchens, Vale, Oregon, for appellants; Lawrence E. Cox, Esq., Assistant Regional Solicitor, United States Department of the Interior, for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

During July of 1974, the Bureau of Land Management (BLM), conducted a survey of the grazing capacity of 16,011 acres of public land in northern Oregon. At that time the land was leased to Inland Terminal Warehouse Co. (Inland) doing business as the Big Muddy Ranch Co. The grazing capacity of the land under lease at the time of the 1974 survey was rated at 2,684 animal unit months (AUMs) of forage. As a result of the survey, the BLM determined that the actual grazing capacity of the land is 662 AUMs of forage.

On July 29, 1975, the BLM allowed 15 days to Big Muddy Ranch Co. to show cause why the reduction should not be imposed immediately. The Ranch Co. obtained an extension until October 10, 1975. In the meantime, the Ranch Co. hired two experts to check the accuracy of the BLM survey. Those experts reached the conclusion that previous estimates of capacity (2,684 AUMs) were more nearly correct than the 1974 survey. The results reached by the two experts were transmitted to the BLM during a meeting on October 10, 1975, between representatives of the ranch and BLM.

On October 30, 1975, the BLM notified the ranch that it had rechecked its own survey and found it to be accurate. Nevertheless, the BLM decided not to impose the reduction before the termination of the lease, February 29, 1976. Apparently, the BLM took that course because the lease probably would have expired before an appeal to this Board could have been decided. ^{1/} In November of 1975, the base lands were sold to Rube W. Evans, and he filed a request for approval of assignment. On December 30, 1975, the BLM approved the request for assignment in part and offered a new lease to begin on the expiration of the old one. The only change

^{1/} In an earlier case, John T. Murtha, 19 IBLA 97 (1975), we held that downward adjustments of grazing capacity must be imposed immediately. However, because, as noted, the lease would almost certainly expire before an appeal to this Board could be decided, and because an appellant can continue to graze at the higher capacity until resolution of the appeal (see 43 CFR 4.21), the District Office did not impose the adjustment. However, the assignment of the lease apparently caused the District Manager to proceed with the reduction without waiting for the lease to expire.

made in the assignment and in the new lease offering was to offer them both on the basis of 662 AUMs instead of 2,684 AUMs. Both Inland and Evans appeal. 2/

Appellants accepted every term of the assigned lease and the new lease, with the exception of the new determination of grazing capacity. Appellants stated in their letter of January 5, 1976, that they refused to accept the new determination for two procedural reasons. Appellants stated in that letter to the BLM:

You have made a grazing use adjustment and an appeal has been taken; an application for review is timely filed herewith, and it is obvious that the grazing use permitted prior to your adjustment would generally continue to be authorized.

However, if the Code provisions concerning assignments require the assignee to accept a new lease and not an assignment of an existing one, then a continuing use may not be authorized, and inasmuch as the assignee is not a lessee he has no appeal right whatsoever.

Thus appellants' concern is twofold. First, if they accept the lease as offered, they forfeit their right to appeal the downward adjustment in grazing capacity. Second, if the assigned lease is a new lease, appellants also fear that they will not be able to use the land up to its previously authorized capacity during the pendency of the appeal as authorized by 43 CFR 4121.3-3(c).

[1] While the appellants' caution on this point is well taken, it does not necessarily follow that the issuance of a new lease will have the effect feared by appellants. It is true that as a result of an assignment, a new lease is issued to the assignee. Carl O. Thomsen, A-27171 (November 7, 1955). However, the assignee still succeeds to all the rights, privileges, liabilities and obligations of the assignor. The Swan Co. v. Banzhaf, 59 I.D. 262,

2/ The Bureau has included an "Analysis of Appeal" in the case file. The analysis sets forth a chronology of events and the Bureau's view of the merits of the appeal. While such "analyses" are welcomed by this Board, as a matter of fairness they should be submitted through the office of the Regional Solicitor and must be served on all other parties. Irvin and Maxine Baker, 15 IBLA 92, 94 (1974). Because appellants have already received a copy of the analysis (see April 13, 1976, letter of Chief Administrative Judge Frishberg), we need not delay the consideration of this appeal.

275 (1946). If the appellants' predecessor in interest had both the right to appeal the downward adjustment and the right to continue grazing at the previous level during the pendency of the appeal, then appellants, his successors in interest, must be held to have the same right.

[2] Appellants have also requested that this Board order a fact-finding hearing pursuant to its discretionary authority, 43 CFR 4.415, in order to resolve the conflict in estimates of grazing capacity. This Board stated in Ruth E. Han, 13 IBLA 296, 304, 80 I.D. 698, 701 (1973):

A person requesting a hearing must at least allege the existence of facts which, if proved, would entitle her to the relief sought before a hearing will be ordered. Clark Canyon Lumber Co., 9 IBLA 347, 80 I.D. 202 (1973); Elaine S. Stickleman, 9 IBLA 327 (1973).

Nevertheless, the Board will not ordinarily order a hearing even where such facts have been alleged, unless there is some indication from the record that an appellant can actually prove the alleged facts. That is what is meant in John T. Murtha, 19 IBLA 97, 101 (1975), where we stated:

In the instant case appellant has alleged the existence of facts which, if proved, would demonstrate error in the District Manager's determination and entitle appellant to the relief sought. Appellant has, however, failed to make available the evidence upon which he relies to substantiate his conclusions. We cannot, therefore, on the basis of the present record, agree that appellant's contention is correct. We will not overturn the District Manager's determination on appellant's mere assertion of error.

We did not mean that an appellant must prove on appeal those facts which can only be proven in a hearing. Rather, what was meant was that appellant must make a specific offer of evidence to establish facts which, if proven, would entitle him to relief.

In the present case, appellants have made such an offer of proof. Moreover, some of their factual assertions do have the hallmarks of credibility. In addition, appellants' conduct since the readjustment has been one of utmost cooperativeness; appellants have agreed not to graze at more than the rated capacity of 662 AUMs pending final resolution of this appeal. Appellants have also hired two experts to do an actual survey. In sum, appellants' conduct is indicative of a concern for accurate resolution of the issues and is not merely the unsupported negative response of a disappointed appellant.

There are many conflicts in the facts of this case and the BLM has conceded that the fact situation is extremely complex. Some of the questions raised favor appellants' assertions and others favor the BLM's findings. For example, the method used by appellants' expert, the "actual weight method," is conceded by the BLM Manual to be more accurate than the method used by the BLM, the "ocular [visual] estimate by plot or plant method." Compare BLM Manual §§ 4412.22B7b(2), (4) and 4412.22B7d(2). On the other hand, the results of the BLM survey are very consistent with the amount of forage which BLM found on other lands in this area by utilizing the same technique. Another conflict in the evidence concerns a pasture used for comparison with the land being surveyed. The BLM believes that the information obtained from the owner of the pasture with respect to actual use is very accurate. Appellants assert, however, that they have interviewed that owner and that he has recanted as to the accuracy of those figures. Furthermore, appellants state, even a small variation in the actual use figures will produce large variation in the number of AUMs of the surveyed area.

Because of the conflicts in the evidence, and the apparently probative nature of the evidence relied on by both sides, a hearing will be held where the issue to be determined will be the actual grazing capacity of the land in question. The burden of proving that the BLM's determination is incorrect will be on appellants. John T. Murtha, *supra*; Claudio Ramirez, 14 IBLA 125, 127 (1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and a hearing ordered.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

